CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1913.~~ 1914

No. ~~1077.~~ 462

THE UNITED STATES

vs.

HON. JULIUS M. MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 1, 1914.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1041.

THE UNITED STATES
vs.
HON. JULIUS M. MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Coxe, and Rogers, circuit judges.

ALBERT FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

In the matter of the petition of the United States of America, petitioner, for a writ of prohibition forbidding Hon. Julius M. Mayer, judge of the United States District Court for the Southern District of New York, respondent, to enter an order affecting the judgment of conviction and granting a new trial herein.

This is an application by the United States for a writ of prohibition to be directed to the District Court, Southern District of New York, restraining said court from entering an order vacating a judgment of conviction and granting a new trial.

Preliminary objection being raised as to the jurisdiction of this court to entertain such application, certain questions or propo-
2 sitions of law arose, concerning which this court desires the instruction of the Supreme Court for its proper decision.

The circumstances under which the application was made are set out in the following:

STATEMENT OF FACTS.

Plaintiff in error (defendant below) was convicted on March 14th, 1913, with two other individuals on five indictments for violation of the statutes relating to the use of the mails in a scheme to defraud and for a conspiracy to commit various offenses against the United States. On that day judgment of conviction was entered and sentence imposed on the defendant on two of said indictments. On one of said indictments no judgment of conviction was entered, sentence being suspended. On the other two indictments judgments of conviction were entered and sentence imposed on one count each; sentence was suspended as to the other counts. As to the indictment and counts on which no judgment of conviction was entered, sentence being suspended, the term was extended on motion of the United States attorney for five years.

Thereafter, on March 24th, 1913, the plaintiff in error sued out a writ of error to this court to review said judgments of conviction.

Thereafter the plaintiff in error filed his assignments of error to said judgments of conviction; and thereafter, on the 13th day
3 of May, 1913, an order was made by this court enlarging the plaintiff in error upon bail pending the determination of his writ of error. No bill of exceptions has been settled or filed or argument had.

Thereafter, on January 12th, 1914, the plaintiff in error gave notice of application in the court below to set aside said judgments of con-

viction and for the quashing of said indictments, or for a new trial upon defendant's verified petition and affidavits, minutes of the trial, certain grand jury minutes, and other papers. The grounds upon which said motion was made were, among others, (1) that the defendant had been deprived of a fair trial by the misconduct of an assistant United States attorney and (2) that one juror when examined on his voir dire concealed a bias against the defendant which he entertained by reason of his observations of the conduct of the defendant and other corporate officers in relation to the production of certain corporate records before a grand jury of which he had been a member.

It is asserted, and found as a fact by the district judge, that neither the defendant nor his counsel had knowledge of the facts on which said motion was based until after the conclusion of the trial and the expiration of the term as to those counts upon which sentence had been imposed, and that said facts could not have been discovered by them by any reasonable diligence at an earlier date.

Thereafter the said application came up for a hearing before the said Hon. J. M. Mayer, district judge, and Hon. Charles M. Hough, another district judge. At said hearing Judge Mayer himself
4 raised the question of the jurisdiction of the district court to entertain the application, in view of the fact that the term had expired, and Judge Mayer and Judge Hough directed briefs be handed in by counsel on that question. Thereupon the United States attorney handed in a memorandum tendering his consent to the hearing of the motion. A copy of said memorandum is hereto annexed, marked Exhibit A.

Thereafter, on March 5th, 1914, the application for a new trial was argued before the said Judge Mayer and Judge Hough. Thereafter, on March 26th, 1914, Judge Mayer handed down his decision granting defendant's application for a new trial, on the ground that defendant had not had a trial by an impartial jury for the reason that one of the jurors at the time of his selection as a juror entertained a bias against the defendant resulting from the juror's observations of the conduct of the defendant and other corporate officers in relation to the production of certain corporate records before a grand jury of which he had been a member, the juror having concealed his bias on his examination on the voir dire for the purpose of securing the jury fees and the events of the trial having been such as to strengthen and confirm this bias. Judge Hough took no part in the decision of the motion, but handed down a memorandum in which he said that in view of the fact that he had presided at part of the trial, he sat with Judge Mayer upon the motion merely to see if his recollection of any of the facts might enable him to assist Judge Mayer in the matter, and he declined to take part in the decision of the application.

5 The order vacating the judgments of conviction and granting a new trial has not yet been entered, the district judge having filed a memorandum stating in substance that the question of

jurisdiction was an important one and that the order would be withheld until the United States attorney had an opportunity to raise the question in a higher court.

Thereafter, and on April 6th, 1914, the United States attorney upon verified petition procured an order to show cause in this court directing Judge Mayer to show cause before this court, on April 9th, why a writ of prohibition should not be issued from this court forbidding the entry of an order vacating said judgments of conviction and granting a new trial on the ground that the district court is without jurisdiction to enter said order, the term at which the said judgments of conviction were entered having expired long prior to the motion for a new trial and a writ of error from said judgments being then pending undetermined in this court.

Certain of the facts upon which the motion for a new trial was granted do not appear in the records of the previous trial.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are as follows:

QUESTION I.

A. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expi-
6 ration of the term at which the judgment was entered, said District Court has indicated its intention to enter an order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?

B. Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated?

In case question I A be answered in the affirmative, then—

QUESTION II.

When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?

QUESTION III.

Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of

the term to vacate a judgment of conviction and the United
7 States attorney thereupon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?

In accordance with the provisions of section 239 of the Judicial Code, the foregoing questions of law are by the Circuit Court of Appeals of the United States for the Second Circuit hereby certified by the Supreme Court.

Dated, New York, April 28, 1914.

E. H. LACOMBE,
Circuit Judge.

ALFRED C. COXE,
Circuit Judge.

HENRY WADE ROGERS,
Circuit Judge.

8 EXHIBIT A.

MEMORANDUM ON MOTION FOR NEW TRIAL.

The court has raised of its own motion the question whether, the term at which the defendant was tried having expired, this court has now jurisdiction to entertain a motion by him for a new trial. The Government has not raised, nor does it now press, this jurisdictional point. The authorities were fully discussed and submitted to the court by the Government at the time of the motion for a new trial in the Morse case.

From an examination of the defendant's moving papers and an investigation of the facts as to the matters therein referred to the Government is entirely satisfied that neither on the ground of the interests of justice nor on technical considerations is there the slightest reason for granting of a new trial in this case, as we believe will abundantly appear to the court if it has occasion to examine the answering papers submitted to it on this motion. Nevertheless, in view of the allegations of the petition reflecting on the conduct of the United States attorney's office and on the conduct and character of a former United States attorney and his assistants, it is their desire and request, and that of the Government, that this court entertain this motion on the merits, and, if the court's decision on this jurisdictional question is in any way dependent on the Government's consent, that consent is hereby fully and freely given.

Dated February 4, 1914.

H. SNOWDEN MARSHALL,
United States Attorney, Southern District of New York.

9 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss.:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case therein entitled, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court at the city of New York, this 28th day of April, 1914.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

10 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. Albert Freeman against the United States. Certificate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1914. William Parkin, clerk. Received Apr. 29, 1914. Office of the clerk, Supreme Court, U. S.

(Indorsed on cover:) Office of the clerk, Supreme Court U. S. Received May 1, 1914. File No. 24192. U. S. Circuit Court Appeals, 2d Circuit. Term No. 1041. The United States *vs.* Hon. Julius M. Mayer, judge of the District Court of the United States for the Southern District of New York. (Certificate.) Filed May 1st, 1914. File No. 24192.

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462

No. 1041

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES

v.

JULIUS M. MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES.
v.
JULIUS M. MAYER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK. } No. 1041.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this cause for hearing at an early day convenient to the court during the next term.

One Albert Freeman was convicted in the District Court for the Southern District of New York of a violation of the statutes relating to the use of the mails in a scheme to defraud, and of a conspiracy to commit various offenses against the United States. Judgments of conviction were entered, sentence imposed, and Freeman sued out a writ of error from the Circuit Court of Appeals, pending the disposition of which he was enlarged upon bail. Thereafter he filed

in the District Court a motion for a new trial based on alleged facts claimed to have been discovered after the expiration of the term at which judgment was entered. Upon the hearing of this motion, the court raised the question of its jurisdiction to entertain the application. Because of certain allegations in the petition reflecting upon the conduct and character of a former United States attorney and his assistants, the United States attorney tendered in writing his consent to the hearing of the motion. The District Court granted Freeman a new trial, but withheld the order vacating the judgments of conviction and granting a new trial, and the district judge filed a memorandum stating that the order would be withheld until the United States attorney had an opportunity to raise in a higher court the question of the District Court's jurisdiction. The United States attorney then filed in the Circuit Court of Appeals an application for a writ of prohibition to be directed to the District Court, restraining said court from entering the order.

Thereupon the Circuit Court of Appeals certified certain questions to this court, as follows:

I.

(*a*) When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expiration of the term at which the judgment was entered, said District Court has indicated its intention to enter an order vacating the judgment and ordering a new

trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?

(*b*) Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition under the circumstances above stated?

In case question I (*a*) be answered in the affirmative, then—

II.

When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?

III.

Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States attorney thereupon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the court were de-

pendent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

MAY, 1914.

○

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MAY 23 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. ~~1041~~ 482

ALBERT FREEMAN,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

In the Matter of the petition of the United States of America, Petitioner, for a Writ of Prohibition forbidding Hon. Julius M. Mayer, Judge of the United States District Court for the Southern District of New York, Respondent, to enter an Order affecting the judgment of Conviction and granting a new trial herein.

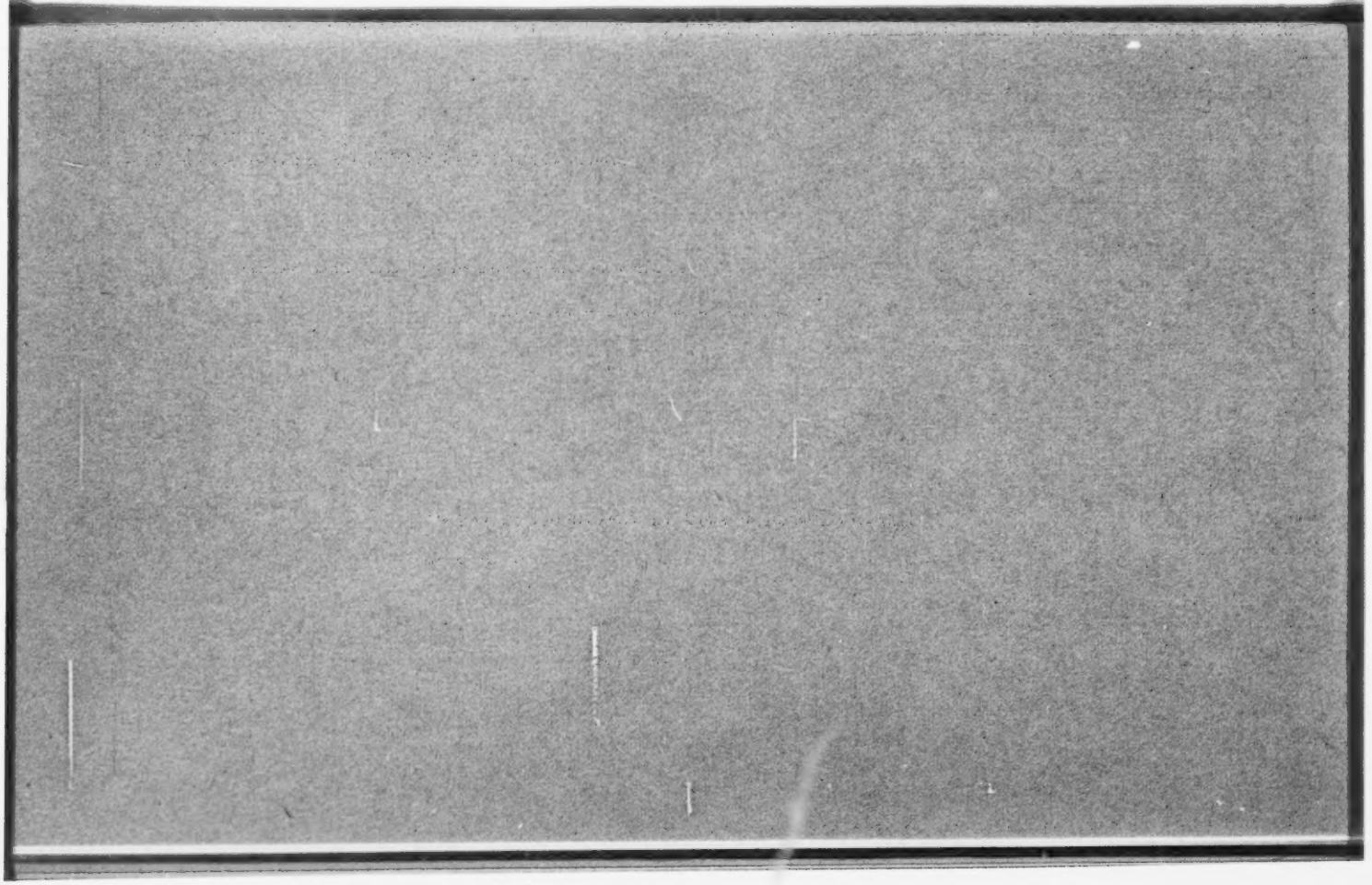
Brief of Respondent in Opposition to Motion to Advance Cause on the Calendar.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

WILSON B. BRICE,
Solicitor for Respondent,
30 East 42nd Street,
New York City.

WILSON B. BRICE,
Of Counsel.

JOHN A. SHIELDS, JR., 41 Liberty Street, New York.



Supreme Court of the United States

No. 1041. October Term, 1913.

Albert Freeman,
Plaintiff-in-Error,

against

The United States of America,
Defendant-in-Error.

In the Matter of

the petition of the United States of America, Petitioner, for a Writ of Prohibition forbidding Hon. Julius M. Mayer, Judge of the United States District Court for the Southern District of New York, Respondent, to enter an Order affecting the judgment of Conviction and granting a new trial herein.

Brief of Respondent in Opposition to Motion to Advance Cause on the Calendar.

I.

Preliminary Objection.

This motion does not comply with Rule 26, Subd. 6.

It is not printed. It contains no statement of the matter involved, nor any reasons for the ap-

plication. All that respondent's counsel has received is a typewritten paper containing the following notice:

> "Please take notice, that on Monday, May 25, 1914, at the opening of Court on that day, or as soon thereafter as counsel can be heard, the undersigned will move this Court to advance for hearing at an early day convenient to the Court during the next October Term, the cause now pending herein on certificate to this Court from the United States Circuit Court of Appeals for the Second Circuit.
>
> Yours, etc.,
>
> JOHN W. DAVIS,
> *Solicitor General.*"

The motion should be denied for this reason alone.

Because of the insufficiency of the motion papers, respondent has no idea upon what grounds the motion is based. Since oral argument is not permitted, there is nothing left for us to do but to meet every possible ground that we can think of which might be urged by the Solicitor General.

II.

The case is not entitled to preference under Rule 26, Subd. 3.

a. *This is not a criminal cause.*

Farnsworth vs. *Montana*, 129 U. S., 104, at foot of p. 113:

> "A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of habeas corpus, which this court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution. *Ex parte Tom Tong*, 108 U. S. 556."
>
> *Ex parte Tom Tong*, 108 U. S., 556.

Here the Court held that proceedings under habeas corpus, even when instituted to arrest a criminal prosecution and secure personal freedom, are civil proceedings in their nature. And the appellate revisory jurisdiction of this Court is governed by the statutes regulating civil proceedings.

At p. 559 the Court says:

> "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the

> contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."

The learned United States Attorney for the Southern District of New York, when he petitioned for the writ of prohibition herein, evidently did not understand the nature of the proceeding. Judge Mayer, one of the District Judges for the Southern District of New York, had decided to grant Freeman a new trial, upon a motion made in the court below, after Freeman had sued out his writ of error to the Circuit Court of Appeals for the Second Circuit. Desiring to prohibit Judge Mayer from entering the order, the U. S. Attorney filed his petition with the Circuit Court of Appeals petitioning for such order. He seemed to think that it was merely a step in the criminal case then before the Circuit Court of Appeals upon the writ of error, so he gave his petition the same title as Freeman's case before the Circuit Court of Appeals (vid. the first title herein). Of course, he was mistaken. His application to prohibit the District Judge was an entirely new and independent action or proceeding and was civil and not criminal. He should have entitled it "United States of America, against Julius M. Mayer, as District Judge," etc. Or he might have given it the title shown herein as a sub-title (vid. sub-title of certificate), which was added by the Circuit Court of Appeals. Of course, the form of the title does not change the nature of the proceeding which is civil and not criminal.

We say, therefore, that this cause is not entitled to a preference as a criminal cause, because it is not one.

b. *It is not entitled to a preference even if it were a criminal case.*

The defendant is enlarged on bail (vid. certificate).

> *Ward* vs. *State of Maryland*, 12 Wall., 163.

Criminal case—not advanced.

Rule 30 then existing—"Criminal cases may be advanced, by leave of the Court, on motion of either party."

Motion to advance made by plaintiff-in-error. Denied.

The Court says at p. 164:

> "Under that rule the motion is addressed to the discretion of the court, and inasmuch as it appears the defendant is not in jail, the court fails to see any reason for granting the motion."

It is a poor rule that does not work both ways —unless there is a mental reservation by the Court that the Solicitor General has rights not accorded to others. Apparently such is not the case, for see

> *U. S.* vs. *Norton*, 91 U. S., 558.

This case came up on a certificate of division between the judges of the Circuit Court for the Southern District of New York.

Motion papers insufficient (criminal case).

Where motion to advance criminal case is made by U. S. on ground that the questions in dispute

will embarrass the operations of the government while they remain unsettled, the motion must state the facts in such a manner that the court can judge whether the government will be embarrassed in the administration of its affairs by delay. "In the present crowded state of the docket, it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others."

III.

The case is not entitled to a preference under Rule 26, Subd. 5.

a. *It is not a revenue case nor is it especially provided by act of Congress.*

b. *It does not affect a matter of "general public interest."*

This raises the question as to what is a matter of "general public interest." It does not necessarily mean "of great legal importance."

Constitutional and jurisdictional questions are, of course, of the greatest legal importance; but unless they arise in some case demanding immediate decision for grave, practical reasons, there is every reason why counsel should not be pressed in preparing for their presentation, nor the court in considering them—*because of their great importance.* On the other hand, a case may be of general public interest although the legal questions involved are comparatively simple, e. g., some test revenue case, the decision of which is necessary to the determination of many other

pending cases involving large business interests. The distinction is shown by the following cases:

B. & O. R. R. Co. vs. *Marshall County Supervisors*, 131 U. S. XCIX Appendix.

This case came up on a certificate of division of opinion of the Circuit Court. Motion to advance on the docket on the ground that very important interests of the state of West Virginia were involved.

Motion denied on the ground that the case did not come within any of the exceptions to the then thirtieth rule.

Huntington vs. *Texas*, 131 U. S. CX Appendix.

Here the motion to advance was granted on the ground that the moneys involved were part of a school fund and were much wanted by the schools of the state.

Central R. R. Co. vs. *Bourbon County*, 116 U. S. 538.

The cases in which the execution of the revenue laws of a state have been enjoined will be advanced only on motion of the state or county showing that the operations of the government of the state will be embarrassed by delay.

Carter vs. *Greenhow*, 109 U. S. 64.

The court here refused to take up three cases out of their regular order even though they were of great public importance. At p. 65 the court said:

> "The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically, every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances, we deem it our duty not to take up a case out of its order except for imperative reasons."

Hoge vs. *R. R. Co.* 93 U. S. 1.

Here the court refused to advance a cause wherein the defendant-in-error had enjoined the plaintiff-in-error from collecting certain taxes. At p. 2 the court says:

> "In the present crowded state of our docket, it is incumbent on us to take care that injustice is not done to 'private parties' by the unnecessary advancement of causes affecting public interests. To that end we now hold, that we will not give preference to cases in which the execution of the revenue laws of a state is enjoined, unless it sufficiently appears that the operations of the government of the state will be embarrassed by delay."

Then the court goes on to say that in the Illinois R. R. tax cases they gave a preference because they were class cases, and their determination would dispose of many other suits of the same character then pending in the Circuit Court in which interlocutory injunctions had been allowed. And in granting those injunctions, the Circuit

Court had practically suspended both the enforcement of the revenue laws of Illinois against railroad corporations and the collection of the taxes assessed on the capital stock and franchises of all other corporations in the state. And the court went on to say that under such circumstances questions of great public interest were involved, and that the operations of the government of the state would be embarrassed by delay.

IV.

The case is not entitled to a preference under Rule 32.

It is not before this court on writ of error or appeal, nor does it come up under Rule 6.

V.

The case is not entitled to a preference under Rule 26, Subd. 7.

No "special or peculiar" circumstances appear, either in the notice of motion or in the certificate of the judges of the Circuit Court of Appeals. There is nothing to show that either Judge Mayer or the judges of the Circuit Court of Appeals consider this question of such pressing, practical importance that it should be urged to a hearing in advance of other cases pending on the docket of this court. On the other hand, it appears plainly from the certificate of the Circuit Court of Appeals that while these questions have happened to arise in an ordinary criminal case, not of itself demanding immediate attention, yet

they are of such great legal importance that their presentation should be thoroughly prepared by counsel and that they should be carefully considered by this court. While the decision of these questions is not needed for immediate authority in any other pending cases, yet their decision will stand as the law for all time.

The resopndent is not asking the court for any favors, but is simply resting on the fact that the government has not brought itself within the terms of any of the rules permitting preference. The Solicitor General is asking this court the especial favor of granting a preference in this case in violation of its own rules. Of course this the court has power to do, and of course if it is the practice of the court to grant all preferences at the request of the Solicitor General—just because he requests it—then there is no answer to be made either by this respondent or by any of the many other litigants whose causes are upon the calendar of this court awaiting a hearing in their turn. But Judge Mayer is just as much a representative of the United States Government as the Attorney General or the Solicitor General. The writ is sought against him in his capacity as an officer of the government. The executive branch of the government asks the court to prohibit the judicial branch from exercising one of its official functions.

We fail, therefore, to see any reason why one branch of the government should receive any greater consideration in this court than any other branch.

The opposition to this motion is not made merely for the purpose of obtaining delay for a

man accused of a crime. Freeman was granted a new trial because it appeared that he had not had a fair trial—not technically, *but actually and morally*—under such circumstances that any fair-minded man would have revolted at the refusal of his application. The order granting the new trial has simply been withheld by Judge Mayer for the express purpose of permitting the United States Attorney for the Southern District of New York to test the question whether the District Court had jurisdiction to grant the new trial. In other words, we have here a case where a man stands before the public morally as an unconvicted man and the Department of Justice is seeking to prevent his getting a new trial under these circumstances and on this technicality. When Freeman first applied for his new trial, Judge Mayer himself raised the question of his jurisdiction. The United States Attorney not only did not dispute it, but positively consented to it (vid. certificate). It became unnecessary, therefore, for Judge Mayer to consider the question of his jurisdiction as thoroughly as he might otherwise have done. Having thus ventured and lost on the motion, the United States Attorney then secures the consent of Judge Mayer to thresh out thoroughly the question of jurisdiction. But it now appears that the Department of Justice does not desire to give this important jurisdictional question full time, but wishes to have it decided at the earliest possible moment. In other words, it is apparent that the Department of Justice is really seeking to hurry this court to a decision in order to see if it cannot prevent a new trial for a man who is conceded to

have been unlawfully and improperly convicted. Now, this is not fair either to Judge Mayer or to his counsel or to Freeman. If the complaint of the government be that unless this matter is hurried to a decision Freeman will be allowed to go untried for a long time, there is an easy answer to that—let them withdraw their application for the writ of prohibition and let him be tried again.

But in this proceeding it is not the *status* of Freeman which concerns either the respondent or this court, but the position in which the Department of Justice is trying to place Judge Mayer, who did not seek the present condition of affairs. Here are four of the most important jurisdictional questions that have ever arisen in this country. They involve the jurisdiction of this court, of the Circuit Court of Appeals and of the District Court. Both the power to grant new trials and the power to issue the writ of prohibition are brought into question. They have been raised by the government itself. Having acted upon the consent and request of the government, Judge Mayer is now entitled to have every one of these questions carefully studied and investigated by counsel before presentation. There is probably little written law upon any one of these subjects—evidently so or there would not have been a division of opinion in the Circuit Court of Appeals. And it is these new basic questions which require the most time for their study and consideration by counsel. It is beside the point to say that argument is not sought until October. If counsel for respondent had nothing else to do between now and the middle of

October, and if he took no rest at all meantime, it is doubtful whether such important questions as these would be solved satisfactorily in that time. The application of the whip and spur to justice generally causes a runaway.

VI.

The motion should be denied.

In all fairness to Judge Mayer, in all fairness to the many other litigants who would be crowded back by this preference, and because we believe that full time should be given to the consideration of such important questions, we submit that this court should not grant this application which is made in violation of the rules of the court as to preferences.

Respectfully submitted,

WILSON B. BRICE,
Of Counsel for Respondent.